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No. 88-1074

In The
Supreme Court of the United States
October Term, 1988

COMMONWEALTH OF VIRGINIA;
EDWARD W. MURRAY, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Petitioners,

v.

DENNIS WALDON STOCKTON,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, Dennis Waldon Stockton, respectfully submits this Brief in Opposition to the Petition for a Writ of Certiorari filed herein by the Commonwealth of Virginia and Edward W. Murray, Director, Virginia Department of Corrections ("Petitioners" or "the Commonwealth").

COUNTERSTATEMENT OF THE CASE

Respondent refers the Court to the opinions of the District Court and Court of Appeals below for a more complete summary of the facts than that contained in Petitioners' Statement of the Case. See Pet. 4a-6a, 13a-16a, 35a-38a, 41a-46a, and 54a-67a.[1] In addition, Respondent highlights below certain facts that are relevant to this Court's review.

In March 1983, Dennis Stockton was tried for the 1978 murder of Kenneth Arnder in the Circuit Court of Patrick County, Virginia. Patrick County is a small, rural county in Southwest Virginia with a population of less than 20,000 people. Stockton's trial was the first capital murder trial in Patrick County in the Twentieth Century. As noted by the Court of Appeals:

> [Stockton's] arrest and trial generated considerable local publicity. The print and broadcast media featured reports of the trial and pretrial proceedings as well as accounts of investigations connecting Stockton to several local murders, the discovery of the victims' bodies, and Stockton's past criminal history. In one newspaper article, Stockton was labeled "Surry County's public enemy number one" and compared to Charles Manson.

Stockton v. Commonwealth, 852 F.2d 740, 741-42 (4th Cir. 1988); Pet. 55a-56a. Due to this charged environment,

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[1] Citations to the Commonwealth's Petition for a Writ of Certiorari, which contains the decisions of the courts below, will be denoted as "Pet. __."

Stockton submitted a pretrial motion for a change of venue or, in the alternative, for sequestration of the jury. The trial court denied Stockton's motion. Throughout the three-and-one-half-day trial, jurors were released for meals and overnight.

The Commonwealth's case against Stockton rested solely on circumstantial evidence and controverted testimony. The Commonwealth failed to produce any physical evidence linking Stockton to the crime. The Commonwealth also failed to produce a murder weapon or any eyewitnesses. Stockton took the stand and denied any involvement in the Arnder killing, a position he has steadfastly maintained to the present day. Nevertheless, the jury found Stockton guilty of capital murder on March 23, 1983. On the next day, the jury recommended that Stockton be sentenced to death.

Shortly after Stockton's trial, Stockton's trial counsel learned of an improper third-party contact with the jury. Counsel was informed that Glen Puckett, the owner of the local Owl Diner, had approached several of the jurors while they were on a lunch break during the penalty phase deliberations and told them, "I hope you fry the son-of-a-bitch," or words to that effect. Stockton moved to set aside the verdict on the basis of that comment. The trial court denied Stockton's motion.

On October 1, 1986, Stockton filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Virginia (Kiser, J.). Stockton alleged, inter alia, that he had been denied his constitutional right to a fair trial as a result of the jury's exposure to Puckett's prejudicial "fry the son-of-a-bitch" comment. The District Court granted Stockton an evidentiary hearing on this issue. Pet. 1a.[2] In addition, the District Court authorized undersigned counsel to depose the jurors from Stockton's trial.

At the evidentiary hearing, the District Court heard testimony from two witnesses to the Owl Diner incident, James Blackard and his former wife Ginger Hall, and from Glen Puckett. The Court also received deposition testimony of the jurors.[3] The testimony

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[2] The District Court granted this hearing because it found that the state trial court had failed to "make findings as to the issue of Puckett's comments to the jurors at the Owl Diner." Pet. 42a. The District Court determined further that the state court hearing had not been "full and fair." Pet. 18a. Accordingly, the District Court held that no presumption of correctness, as prescribed by 28 U.S.C. § 2254(d), attached to any of the state court's findings regarding Puckett's comments. Pet. 42a. This ruling was affirmed by the Court of Appeals. 852 F.2d at 745 & n.2; Pet. 63a-64a & n.2.

[3] The District Court declined to consider juror testimony concerning the effect of the "fry the son-of-a-bitch" remark upon the jurors' mental processes or the jury's deliberations, in accordance with Fed. R. Evid. 606(b). Pet. 40a-41a. The Court of Appeals concurred in this ruling. 852 F.2d at 743-44; Pet. 61a.

clearly established, and the District Court found, that during a lunch break taken in the midst of the jury's sentencing deliberations, Puckett had approached three male jurors, who were having lunch together at the Owl Diner, and told them, "I hope you fry the son-of-a-bitch," or something similar.[4] Pet. 35a-37a, 41a.

The District Court concluded that Puckett's "fry the son-of-a-bitch" remark had deprived Stockton of his Sixth Amendment right to a fair trial by an impartial jury. In reaching this conclusion, the District Court applied the analysis for extrajudicial juror contacts set forth by this Court in Remmer v. United States, 347 U.S. 227 (1954) ("Remmer"), as adopted by the Fourth Circuit in Haley v. Blue Ridge Transfer Co., 802 F.2d 1532 (4th Cir. 1986). Pet. 39a. The District Court first determined that Stockton had met his burden of proving that the jurors were in fact exposed to an extrajudicial contact that related directly to "the focus of the jury's deliberations, i.e., whether to impose a life or death sentence upon Stockton."

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[4] There was additional evidence that on that same day Puckett also approached a group of three female jurors to whom he said something "nasty" about Stockton. Pet. 37a. Puckett himself testified that, while he did not recall making the "fry the son-of-a-bitch" statement, "knowing me, I could have said it." Pet. 36a.

Pet. 40a-41a. The District Court then found that Puckett's comments were far from "innocuous" -- "[i]ndeed, a comment could not be more pointed than 'I hope you fry the son-of-a-bitch'" -- and therefore raised a rebuttable "presumption of prejudice." Id. Finally, the District Court held that the Commonwealth had failed to rebut this presumption. Pet. 42a-46a. Thus, the District Court concluded that Stockton's Sixth Amendment rights had been violated and that the Commonwealth should give Stockton a new sentencing hearing or reduce his sentence to life imprisonment. Pet. 46a-47a.

The Court of Appeals for the Fourth Circuit, in an opinion by Judge Wilkinson, affirmed. The Court of Appeals held that extrajudicial contacts relating directly to the matter pending before the jury are to be viewed as presumptively prejudicial, and that the burden rests on the government to rebut the presumption, in accordance with Remmer and Mattox v. United States, 146 U.S. 140 (1892). 852 F.2d at 743; Pet. 60a. The Court of Appeals rejected Petitioners' argument that the Remmer presumption of prejudice attaching to extrajudicial communications was overturned by this Court in Smith v. Phillips, 455 U.S. 209 (1982). 852 F.2d at 744; Pet. 61a-62a. Moreover, the Court of Appeals agreed with the District Court that Petitioners

had failed to rebut the presumption in this case. As Judge Wilkinson wrote for the Court of Appeals:

> This was no mere offhand comment. Puckett knew that he was addressing his opinion to members of the jury -- his comment about what should happen to Stockton was preceded by an inquiry as to whether the jurors had reached a decision. Further, the comment bore on the exact issue -- whether to impose the death penalty -- that the jurors were deliberating at that time. . . . Although many jurors attempted dutifully to ignore expressions of public opinion and to avoid commenting on the case, they were powerless to avoid contact with the public. As a result they were exposed to the type of pointed and prejudicial suggestion whose utterance encourages the all too human tendency to pursue the popular course.

852 F.2d at 746; Pet. 65a-67a.

SUMMARY OF ARGUMENT

Almost a century ago, this Court declared that "[p]rivate communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." Mattox v. United States, 146 U.S. at 150. In Remmer v. United States, this Court reiterated this rule:

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending

> before the jury is, for obvious reasons, deemed presumptively prejudicial . . . . The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

347 U.S. at 229 (citations omitted).[5] Since at least the time of Remmer, courts throughout the United States have applied this presumption of prejudice analysis to extrajudicial contacts with jurors. See discussion, infra pp. 12-13.

Petitioners, however, contend that this Court, in Smith v. Phillips, eliminated the Remmer presumption of prejudice. Petitioners further contend that a "sharp split" exists in the federal circuits on this issue and that this purported split requires the Court's review of the Court of Appeals' decision.

The petition for a writ of certiorari should be denied. First, Petitioners agreed, in the District Court below, that the Remmer "presumption of prejudice" test should be applied in this case. They should not be permitted to raise an issue in this Court that they did not present to the District Court.

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[5] Because Sixth Amendment rights are "fundamental to the American scheme of justice," they are applicable to state court criminal prosecutions. Duncan v. Louisiana, 391 U.S. 145, 149 (1968). See also Parker v. Gladden, 385 U.S. 363, 364 (1966).

Second, the asserted conflict among the circuits does not warrant review in this case. Except for the Sixth Circuit, no other circuit has concluded that the Remmer presumption is no longer applicable to cases involving extraneous jury contacts. On the contrary, nine circuits have continued to apply the Remmer presumption in these cases, and two circuits have not yet established a clear position on this issue. Moreover, the Sixth Circuit itself may not have fully resolved its views on this question. And most importantly, the conflict is not squarely presented by this case. The Sixth Circuit has not yet addressed the application of the presumption in circumstances such as these, in which the improper contact was not discovered until after the jury had concluded its deliberations and the jurors were accordingly prohibited from testifying about the impact of the contact on their verdict.

Finally, the petition should be denied because the decision below was correct. Smith v. Phillips was a reaffirmation, not a reversal, of Remmer. Neither Phillips nor United States v. Frady, 456 U.S. 152 (1982), invalidates the presumption of prejudice employed by the courts below. That presumption is required in improper contact cases because of Fed. R. Evid. 606(b) and the prior holdings of this Court. The burden imposed by the presumption of prejudice on the

party defending the verdict is far from insurmountable. That Petitioners were unable to rebut the presumption in this case simply confirms the seriously prejudicial nature of Puckett's "fry the son-of-a-bitch" remark.

REASONS FOR DENIAL OF THE WRIT

I. Petitioners Failed To Raise the Issue on Which Certiorari Is Sought in the District Court

Although Petitioners assert that the question presented in their Petition is one of "special importance," Pet. 7, Petitioners did not question the use of the Remmer "presumption of prejudice" test in the District Court. In their Post-Trial Memorandum, submitted after the evidentiary hearing, Petitioners stated that, "For the purposes of this Memorandum, [the Commonwealth] will assume, without conceding, that [Stockton] has submitted an appropriate analytical framework." Commonwealth's Post-Trial Memorandum at 9.[6]

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[6] The Commonwealth also accepted Remmer as the appropriate standard at the District Court hearing on April 20, 1987, as reflected in the following exchange:

> The Court: "So you're basically agreeing that the Haley framework is the correct one."
>
> Mr. Ferguson [for the Commonwealth]: "Yes, sir, I think it certainly is a usable one, in the context of this case anyway."

Transcript of April 20, 1987 Hearing at 52.

As the District Court noted: "The parties agree that the proper analytical framework to be applied . . . is set forth in the case of Haley v. Blue Ridge Transfer Co.," which followed the Remmer presumption. Pet. 39a.

The Commonwealth first argued that Smith v. Phillips had overruled the Remmer "presumption of prejudice" only after the adverse ruling in the District Court, when this case was on appeal in the Fourth Circuit. A party may lose its right to raise an issue in this Court "when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation." Steagald v. United States, 451 U.S. 204, 209 (1981); cf. Lawn v. United States, 355 U.S. 339, 362 n.16 (1957) ("Only in exceptional cases will this Court review a question not raised in the court below."). Petitioners forfeited their right to contest the applicability of the Remmer presumption when they acquiesced in the use of that standard in the District Court. See Steagald, 451 U.S. at 208-11.[7]

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[7] The Court of Appeals below addressed this issue on the merits. Nevertheless, the Court of Appeals should have rejected Petitioners' argument on the ground that Petitioners had not even raised this point in the District Court. See, e.g., United States v. Seidlitz, 589 F.2d 152, 160 (4th Cir. 1978), cert. denied, 441 U.S. 922 (1979).

II. This Case Does Not Squarely Present a Conflict Among the Federal Circuits Warranting Review by This Court

Petitioners argue that there is a "split" in the circuits concerning the continued applicability of the Remmer "presumption of prejudice" rule since Smith v. Phillips which warrants this Court's review. Stockton respectfully disagrees.

The "split," to the extent that it exists at all, involves a single circuit. Apart from the Sixth Circuit, no other circuit has concluded that the Remmer presumption of prejudice is no longer applicable in cases involving extraneous jury contacts. On the contrary, nine circuits have continued to apply the Remmer presumption in these cases. See, e.g., United States v. Wiley, 846 F.2d 150, 157-58 (2d Cir. 1988); United States v. Leon, 739 F.2d 885, 893 n.20 (3d Cir. 1984); Haley v. Blue Ridge Transfer Co., 802 F.2d at 1535-37 (4th Cir. 1986); Owen v. Duckworth, 727 F.2d 643, 646 (7th Cir. 1984); United States v. Robinson, 756 F.2d 56, 59 (8th Cir. 1985); United States v. Littlefield, 752 F.2d 1429, 1431-32 (9th Cir. 1985);[8] United States v. Hornung, 848 F.2d 1040,

[8] Petitioners claim that the Ninth Circuit, like the Sixth Circuit, has rejected the use of the Remmer presumption in cases of extraneous juror contacts, citing United States v. Madrid, 842 F.2d 1090 (9th Cir.), cert. denied, 109 S. Ct. 269 (1988). Pet. 13. The decision in Madrid, however, appears to have been limited to cases involving "ex parte contacts which [do]

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1043-46 (10th Cir. 1988); United States v. Caporale, 806 F.2d 1487, 1503 (11th Cir. 1986), cert. denied, 107 S. Ct. 3265 (1987); United States v. Butler, 822 F.2d 1191, 1194-96 (D.C. Cir. 1987). The two remaining circuits -- the First[9] and Fifth[10] -- have not yet established a clear

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not pertain to 'any fact in controversy . . . applicable to the case.'" 842 F.2d at 1093 (citation omitted; emphasis added). It is therefore consistent with Remmer, which required that prejudice be presumed only where the contact concerned "the matter pending before the jury." 347 U.S. at 229. In such cases, the Ninth Circuit has consistently applied the Remmer presumption since Phillips. See Dickson v. Sullivan, 849 F.2d 403, 405-08 (9th Cir. 1988); United States v. Kupau, 781 F.2d 740, 744-45 (9th Cir.), cert. denied, 479 U.S. 823 (1986); Littlefield, 752 F.2d at 1431-32.

[9] Petitioners suggest that the First Circuit has joined the Sixth Circuit's analysis, citing Neron v. Tierney, 841 F.2d 1197 (1st Cir.), cert. denied, 109 S. Ct. 90 (1988). Neron, however, was a case involving inherent juror bias, and not extraneous contacts.

Other First Circuit decisions regarding improper juror contacts suggest that that court will continue to apply the Remmer presumption. In United States v. Flaherty, 668 F.2d 566 (1st Cir. 1981), a pre-Phillips decision, the court adopted the Remmer presumption in the context of ex parte communications between juror and judge. Id. at 601-02. Flaherty was later relied on in Vontour v. Vitale, 761 F.2d 812 (1st Cir. 1985), cert. denied sub nom. Saugus v. Vontour, 474 U.S. 1100 (1986), a post-Phillips case, also involving ex parte communications between judge and jury. Id. at 815-17.

[10] Petitioners cite to Miller v. Estelle, 677 F.2d 1080 (5th Cir.), cert. denied, 459 U.S. 1072 (1982), a case in which the Fifth Circuit declined to apply the Remmer presumption to third-party contacts with jurors during the sentencing phase of the trial, id. at 1084-86. As Petitioners note, however, this ruling was not based on Smith v. Phillips. Pet. 14. Rather, the panel mistakenly treated the presumption of prejudice as an

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position on this issue.

Moreover, although the Sixth Circuit appears to have adopted a different rule, see United States v. Pennell, 737 F.2d 521 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985), the Sixth Circuit itself may not have fully resolved its views on this issue. No doubt, the Pennell approach represents the predominant view in that circuit and, as Petitioners have noted, was recently reaffirmed. United States v. Zelinka, 862 F.2d 92 (6th Cir. 1988). However, the issue has never been considered en banc by the Sixth Circuit, and Pennell itself was written over the vigorous dissent of Judge Celebrezze, who explained that the majority had "misapprehend[ed] the role of the presumption in both Remmer and [Smith v.] Phillips." As stated by Judge Celebrezze,

> In Phillips, the issue was whether a conclusive presumption of prejudice should apply. The issue of a

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outgrowth of the presumption of innocence. 677 F.2d at 1085. The decision also appears to have been motivated, at least in part, by a belief that the defendant was responsible for the contacts with the jury. See id. at 1082, 1085-86.

For these reasons, Miller does not support the proposition upon which Petitioners seek certiorari. As Petitioners themselves acknowledge, the Fifth Circuit has not yet determined whether Smith v. Phillips has affected the presumption of prejudice, see Abell v. Potomac Ins. Co., 858 F.2d 1104, 1146 (5th Cir. 1988). Pet. 15.

> conclusive presumption, more often termed the doctrine of "implied bias," involves a different line of cases than those which address a presumption of prejudice.

737 F.2d at 539 (emphasis in original; footnote omitted). Furthermore, a recent Sixth Circuit decision has continued to follow the Remmer presumption of prejudice in a case involving extraneous jury contacts. Atkins v. Foltz, No. 87-1341 (6th Cir. Aug. 24, 1988) (unpublished opinion; text on LEXIS). See also McLaurin v. Parke, No. 82-5460 (6th Cir. Jan. 20, 1983) (unpublished opinion; text on LEXIS) (following Remmer presumption of prejudice test in post-Phillips case).

Under the circumstances, this would not be an appropriate case for the exercise of the Court's limited certiorari jurisdiction. Given the clear majority position of the circuits on this question, we respectfully suggest that the Court should allow time for the Sixth Circuit to reconsider its position. If the Sixth Circuit declines to reconsider this issue, the Court might then resolve the issue in a case from that circuit.

Finally, and most importantly, despite the Sixth Circuit's apparent departure from the majority view concerning the continuing vitality of the Remmer presumption in general, there is no conflict among the circuits with respect to the specific issue presented by

this case. There is a crucial factual distinction between the Sixth Circuit's decisions in Pennell and Zelinka and the present case. In both of these Sixth Circuit cases, the extraneous contact was discovered -- and the resulting hearing on potential juror bias was held -- prior to entry of the jury's verdict. Thus, the trial judge was able to investigate the alleged incident and question the jurors about their ability to remain impartial. The trial judge was able to take steps to ensure that the contact was harmless, such as admonishing the jurors to ignore the extraneous comment in their deliberations.

Here, however, the contact was not discovered until after the verdict. Therefore, the evidentiary hearing concerning the "fry the son-of-a-bitch" remark was conducted pursuant to Federal Rule of Evidence 606(b), which precluded juror testimony about the impact of the extraneous comment on their verdict.[11]

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[11] Rule 606(b) permits a juror to testify about the existence of extrajudicial contacts, but not about their effect on the jury's deliberations or the basis for the verdict. The rule represents a compromise between two important objectives. On the one hand, Rule 606(b) seeks to promote the freedom of jury deliberations, to further the stability and finality of verdicts, and to protect jurors against annoyance and embarrassment. Cf. McDonald v. Pless, 238 U.S. 264, 268 (1915). On the other hand, Rule 606(b) attempts to ensure that a defendant is not deprived of a fair trial by an impartial, untainted jury; it allows inquiry into the factual circumstances concerning contacts outside the

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See note 3, supra. In cases involving post-verdict hearings, the Remmer "presumption of prejudice" arises, at least in substantial part, because of the inability to question jurors on the effect of potentially prejudicial remarks. See, e.g., United States v. Hornung, 848 F.2d at 1045 (Remmer presumption is necessary because of evidentiary proscription of Rule 606(b)); Haley, 802 F.2d at 1537 & n.10 (Rule 606(b) provides persuasive rationale for presumption of prejudice with burden of rebuttal on party who benefited from verdict); 3 J. Weinstein & M. Berger, Weinstein's Evidence, ¶ 606(05), at 606-59 (1988) ("Since a juror may not testify as to how any extraneous material affected his decision, once the introduction of extraneous material has been established, a presumption of prejudice becomes operative."). See also Stockton, 852 F.2d at 743-44; Pet. 61a.

Here, the lower courts applied the Remmer presumption to an improper juror contact discovered post-trial. Pennell and the other Sixth Circuit cases cited by Petitioners did not arise in this context. Thus, the Sixth Circuit has not had the opportunity to

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courtroom. See Advisory Committee Note on Rule 606, reprinted in 10 J. Moore & H. Bendix, Moore's Federal Practice § 606.01[6] (1988); see also Tanner v. United States, 483 U.S. 107 (1987).

consider whether the "presumption of prejudice" rule should be applied in cases like this, which are subject to Rule 606(b). There is, therefore, no conflict among the circuits on the issue presented by this case.

III. The Courts Below Were Correct in Applying the Presumption of Prejudice Test to the "Fry the Son-of-a-Bitch" Remark

Finally, the decision of the Fourth Circuit in this case is wholly consistent with Supreme Court precedent. Petitioners contend that the Remmer "presumption of prejudice" has been overruled by the following language in Phillips: "This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." 455 U.S. at 215. Immediately after the quoted sentence, however, Phillips cites to Remmer as an example of how cases of alleged juror partiality should be resolved and expressly notes that the Remmer court viewed the extraneous contact in that case as "'presumptively prejudicial.'" Id. (quoting Remmer, 347 U.S. at 229). Petitioners' argument is undermined by the Phillips Court's reliance on Remmer.

In Phillips, this Court held that issues of juror bias properly should be addressed through a hearing "like that ordered in Remmer." Id. at 217 (footnote omitted). As noted above, a Remmer hearing is one in

which the burden of proof rests upon the government to establish that an outside influence on the jury was "harmless to the defendant." Remmer, 347 U.S. at 229. Similarly, in Phillips, this Court refused to find inherent bias because the "state trial court [had] determined 'beyond a reasonable doubt' that a juror's out-of-court action did not influence the verdict." Rushen v. Spain, 464 U.S. 114, 119 n.3 (1983).

In short, Phillips did not overrule the Remmer "presumption of prejudice." On the contrary, the Phillips Court simply rejected the argument that a conclusive presumption of prejudice should be applied under the facts of that case. Phillips reemphasized that the Remmer presumption is rebuttable, not conclusive, and that issues of alleged jury bias are therefore to be resolved through an evidentiary hearing at which the government is given an opportunity to rebut the presumption. 455 U.S. at 215-17. Far from overruling Remmer, the Phillips Court criticized the lower courts in that case for failing to follow its teachings. Id. at 218.

Even assuming, arguendo, that Phillips implicitly rejected the use of a "presumption of prejudice" test on the facts presented, Phillips does not conflict with the decision of the Court of Appeals below. Phillips involved an issue of juror impairment or predisposition,

a matter that can be exposed at voir dire, whereas this case, like Remmer, involves the effect of an extrajudicial communication during trial upon the deliberative process of the jury. 852 F.2d at 744; Pet. 62a. See also Haley v. Blue Ridge Transfer Co., 802 F.2d at 1535-36 n.5 (voir dire is an effective method of rooting out intrinsic juror bias). Obviously, voir dire cannot prevent bias resulting from improper contacts with jurors during the trial. Thus, even if Phillips did reject the use of a "presumption of prejudice" test in inherent bias cases, it did not reject the use of this test in cases involving extraneous jury contacts.[12]

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[12] Petitioners further suggest that this Court's decision in United States v. Frady, 456 U.S. 152 (1982), requires application of an "actual prejudice" test in this habeas corpus action. Pet. 17-18. Petitioners' reliance on Frady is misplaced. Frady only required a habeas corpus petitioner to demonstrate "actual prejudice" in order to satisfy the "cause and prejudice" test of Wainwright v. Sykes, 433 U.S. 72 (1977), to overcome the procedural bar resulting from failure to preserve a claim in state court. 456 U.S. at 167-68. Frady is inapposite to the present case, in which Stockton's constitutional claim of juror partiality was presented to the Virginia state courts. See 852 F.2d at 743 n.1; Pet. 58a-59a n.1.

Moreover, Smith v. Phillips was itself a habeas case. And, as discussed above, Phillips reaffirms Remmer. Phillips therefore demonstrates, contrary to Petitioners' contention, that the Remmer presumption of prejudice applies in habeas cases. The lower federal courts have often applied the Remmer presumption of prejudice test in habeas actions. See, e.g., Owen v. Duckworth, 727 F.2d at 646; Parrott v. Arkansas, 497 F.2d 1123, 1124-26 (8th Cir. 1974); Ladd v. South Carolina, 415 F.2d 870, 872-73 (4th Cir. 1969), cert.

[Footnote continued on next page]

Petitioners contend that the "presumption of prejudice" test places an intolerable burden on the government due to the prohibition of Federal Rule of Evidence 606(b). This Rule works both ways, however: it prohibits defendants, as well as the prosecution, from calling jurors in order to obtain testimony concerning the effect of extraneous contacts on their deliberations. And if the question then becomes not whether there should be a presumption but which way the presumption should run, the Court of Appeals here reminded us that the Sixth Amendment guarantees the defendant -- not the government -- a right to an impartial jury. 852 F.2d at 744; Pet. 61a.[13]

Moreover, the defendant bears the initial burden of proof even with the presumption. The defendant must first come forward with evidence showing that jurors were exposed to prejudicial extrajudicial contacts and that those contacts related directly to the matter pending before the jury. See Remmer, 347 U.S. at 229.

[Footnote continued from previous page]
denied, 397 U.S. 1049 (1970). Cf. Parker v. Gladden, 385 U.S. at 365 (on review of state post-conviction proceeding, this Court deemed extraneous juror contact to be inherently prejudicial).

[13] More generally, our society's commitment to trial by an impartial jury requires that the burden be placed on the party defending a verdict reached by jurors exposed to prejudicial contacts -- in this case, the Commonwealth. See Mattox, 146 U.S. at 149-50; Haley, 802 F.2d at 1537.

In many instances, defendants will not even be able to prove that such contacts occurred. In these cases, the "presumption of prejudice" does not arise. See, e.g., United States v. Caporale, 806 F.2d at 1503; United States v. Robinson, 756 F.2d at 59. As the Court of Appeals noted below, "while a presumption of prejudice attaches to an impermissible communication, the presumption is not one to be casually invoked." 852 F.2d at 745; Pet. 63a.

In addition, even though Rule 606(b) prohibits jurors from testifying about the subjective impact of extraneous influences on their verdict, the government will often be able to rebut the presumption of prejudice based upon circumstantial evidence, including juror testimony concerning the facts and circumstances surrounding the extraneous communication. See, e.g., United States v. Hornung, 848 F.2d at 1043-46; United States v. Bagnariol, 665 F.2d 877, 883-89 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982). The fact that the Commonwealth was unable to rebut the presumption in this case does not indicate that the government will invariably, or even generally, be unable to make such a showing. Rather, it simply indicates the serious nature of the incident that took place in this case. "I hope you fry the son-of-a-bitch" was, as the District Court noted, the kind of remark that "would stick in the minds

of the jurors who heard it when they resumed their sentencing deliberations." Pet. 45a. As the Court of Appeals concluded: "Puckett's comment posed a potential for prejudice that was too serious to ignore." 852 F.2d at 745; Pet. 65a.[14] Cf. Parker v. Gladden, 385 U.S. at 363-65 (defendant deprived of Sixth Amendment right to fair trial where bailiff told a juror, "Oh that wicked fellow, he is guilty.").

Puckett's "fry the son-of-a-bitch" remark is particularly troubling in view of the fact that it was directed to the life or death question then squarely before the jury: whether Stockton should be executed or given a life sentence. As this Court has noted, "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." California v. Ramos, 463 U.S. 992, 998-99 (1983) (footnote omitted). Here that determination was tainted by Puckett's inflammatory remark.

Respondent recognizes that the law must not ignore the "day-to-day realities of courtroom life," or

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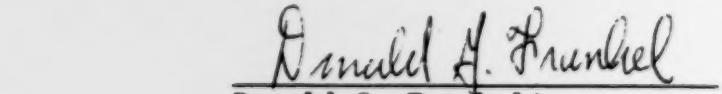
[14] In this case, the potential for prejudice was greatly heightened by the "casualness with which the trial was conducted." 852 F.2d at 746; Pet. 66a. The Court of Appeals was troubled by "the trial court's failure to take more modest steps [than sequestration or change of venue] to protect the jurors from community sentiment." Id.

undermine "society's interest in the administration of criminal justice." Rushen v. Spain, 464 U.S. at 119 (1983) (footnote omitted). The Remmer "presumption of prejudice" test, however, has not resulted, and will not result, in the invalidation of numerous convictions on dubious grounds. On the contrary, in recent years few convictions have been invalidated through application of the Remmer presumption in cases involving third-party juror contacts. That presumption, however, remains an important protection against improper influence on jurors. It ensures that jurors base their verdict solely on the evidence presented at trial, and thus protects "the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." Turner v. Louisiana, 379 U.S. 466, 472 (1965).

CONCLUSION

For the foregoing reasons, Respondent urges this Court to deny the petition for a writ of certiorari.

Respectfully submitted,



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